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Dato' Seri Anwar bin Ibrahim v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-05–163 OF 2006
HASAN LAH, ABDUL MALIK ISHAK AND AHMAD MAAROP JJCA
6 JULY 2011

Civil Procedure — Judge — Application to recuse judge in criminal trial — Appellant's application dismissed — Appeal against dismissal — Preliminary objection that trial judge's ruling not appealable — Whether ruling appealable — Whether trial judge prejudged case — Whether trial judge's ruling was in nature of pre-judgment — Whether trial judge applied wrong test at close of prosecution's case before calling defence of appellant — Whether trial judge quoted out of context — Real danger of bias test — Whether application for recusal ought to be allowed

Civil Procedure — Stay of proceedings — Application for — Pending appeal to Federal Court — Whether stay ought to be granted

The appellant was charged with intentionally committing carnal intercourse against the order of nature with one Mohd Saiful Bukhari ('the complainant'), an offence punishable under s 377B of the Penal Code. The prosecution called upon 26 witnesses before it closed its case. At the close of the prosecution case the trial judge held that the prosecution had succeeded in proving a prima facie case against the appellant and called upon the appellant to enter his defence to the charge against him. However, the appellant applied by way of a notice of motion to recuse the trial judge from continuing to hear the criminal proceedings against him on the grounds of pre-judgment and biasness. The appellant also sought for an order that the hearing be heard de novo before another judge of the High Court and for his bail to be extended until that hearing date was fixed. The trial judge who refused to recuse himself dismissed the notice of motion. This was the appellant's appeal against the dismissal of that notice of motion. The appellant argued that the trial judge's ruling at para 121 of his written judgment, made at the close of the prosecution case, that he found the complainant to be 'a truthful witness, and his evidence reliable and if accepted would establish all the facts required to prove the charge against the appellant' was in the nature of a pre-judgment. The prosecution raised the preliminary objection that the ruling of the trial judge not to recuse himself was not appealable as it did not fall within the meaning of the word 'decision' in s 3 of the Courts of Judicature Act 1964 ('CJA') read together with s 50(1)(a) of the CJA for the simple reason that the ruling of the trial judge was made in the course of the trial and it did not finally dispose of the appellant's rights under the sodomy charge. It was therefore the prosecution's argument that the

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appellant's present appeal should be dismissed for want of jurisdiction. In support the prosecution relied on the landmark decision of this court in *Dato Seri Anwar Ibrahim v Public Prosecutor* [1999] 1 MLJ 321 (CA) ('the 1999 case') where the court had to determine a similar issue ie as to whether the matter of bail was appealable to the Court of Appeal taking into consideration the definition of the word 'decision' in s 3 of the CJA and the decision of the Federal Court in *Dato Seri Anwar Ibrahim v Public Prosecutor [2010]* ('the 2010 case'). In response the appellant submitted that the word 'decision' as defined in s 3 of the CJA did not include any ruling made in the course of a trial of any matter which did not finally dispose of the rights of the parties and that by itself could not exclude the right of the appellant to lodge an appeal against the ruling by the trial judge. The appellant further submitted that the ruling relating to the recusal of a judge, which arose before this court in the 1999 case was erroneous and this panel should not be bound by it.

Held, dismissing the appeal and the appellant's oral application to stay the sodomy trial pending the outcome of his proposed appeal to the Federal Court:

(1) The appellant had deliberately taken para 121 of the trial judge's judgment in isolation and read it out of context. It was willfully done with malice aforethought for the sole purpose of distorting the written judgment of the trial judge at the close of the prosecution's case. In the circumstances it was difficult for this court to believe and accept that the filing of the notice of motion was anything but bona fide or arose from a genuine belief that the trial judge had been biased against the appellant. In any case upon examining the trial judge's ruling in the context that it was made, it was found that the trial judge had applied the correct principle of law when he evaluated the prosecution's evidence to a maximum evaluation before deciding whether the prosecution had succeeded in proving a prima facie case against the appellant. There was also nothing wrong in the trial judge using the word 'truthful' to describe the complainant. As such, the appellant's allegations of pre-judgment and bias were obviously unfounded (see paras 17–21, 28–30 & 61–62).

(2) The law as to the ruling of the trial judge in refusing to recuse himself from hearing or continuing to hear the trial of the appellant for the sodomy charge was quite settled. It was not appealable. Besides the 1999 case there was the Federal Court decision in the 2010 case, which also dealt with the same issue and arrived at the conclusion that the ruling of the trial court was not a 'decision' as defined in s 3 of the CJA and hence was not appealable. Based on the principle of stare decisis, this court was bound by the Federal Court decision in the 2010 case. In any case s 3 of the CJA was amended by Parliament in 1988 and since Parliament could not be said to amend in vain this court must give effect to that amended section. The definition of the word 'decision' in s 3 of the CJA must be given its ordinary and natural meaning. Further, although this court was

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urged to be bold and depart from its decision in the 1999 case it declined to do so (see paras 36– 37 & 43–47).

(3) The trial judge was performing his judicial duty in assessing the evidence led by the prosecution on a maximum evaluation basis without any bias exhibited. After applying the real danger of bias test this court found that the facts and circumstances of the present case favoured the continuation of the sodomy trial before the same trial judge. Thus the bid to recuse the trial judge was dismissed forthwith and the preliminary objection raised by the prosecution allowed (see paras 64, 66).

(4) In the present case the appellant applied for a stay of criminal proceedings when his appeal to the Federal Court against the decision of this court had yet to be filed. In determining whether to allow the stay it was emphasised that the seriousness of the offence which the appellant was currently facing was a relevant factor for refusing to grant the stay. Further, the delaying tactics engineered by the appellant were also a factor in refusing to grant the stay (see paras 80–90).

[Bahasa Malaysia summary

Perayu telah dituduh sengaja melakukan persetubuhan yang bertentangan dengan aturan tabii dengan Mohd Saiful Bukhari ('pengadu'), satu kesalahan yang boleh dihukum di bawah s 377B Kanun Keseksaan. Pendakwaan telah memanggil 26 saksi sebelum kesnya ditutup. Di penutup kes pendakwaan hakim perbicaraan telah memutuskan bahawa pendakwaan telah berjaya membuktikan kes prima facie terhadap perayu dan memanggil perayu memasukkan pembelaannya kepada pertuduhan terhadapnya. Walau bagaimanapun, perayu telah memohon melalui notis usul agar hakim perbicaraan menarik diri daripada terus mendengar prosiding jenayah terhadapnya atas alasan pra-penghakiman dan sikap berat sebelah. Perayu juga memohon perintah agar perbicaraan didengar de novo di hadapan hakim Mahkamah Tinggi yang lain dan agar jaminannya dilanjutkan sehingga tarikh perbicaraan tersebut ditetapkan. Hakim perbicaraan yang enggan menarik diri telah menolak notis usul itu. Ini adalah rayuan perayu terhadap penolakan notis usul tersebut. Perayu berhujah bahawa keputusan hakim perbicaraan dalam perenggan 121 penghakiman bertulis beliau, yang disampaikan di penutup kes pendakwaan, yang mana beliau mendapati bahawa pengadu adalah 'truthful witness, and his evidence reliable and if accepted would establish all the facts required to prove the charge against the appellant' adalah bersifat – pra-penghakiman. Pendakwaan telah menimbulkan bantahan awal bahawa keputusan hakim perbicaraan untuk tidak menarik diri beliau tidak boleh dirayu kerana ia termasuk dalam maksud perkataan 'decision' dalam s 3 Akta Mahkamah Kehakiman 1964 ('AMK') dibaca bersama s 50(1)(a) AMK kerana alasan mudah bahawa keputusan hakim perbicaraan telah dibuat semasa perbicaraan dan ia tidak melupuskan terus hak-hak perayu di bawah pertuduhan meliwat. Oleh itu hujah pendakwaan bahawa rayuan perayu ini

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patut ditolak kerana ketiadaan bidang kuasa. Sebagai sokongan pendakwaan bergantung kepada keputusan terkemuka mahkamah ini dalam kes *Dato Seri Anwar Ibrahim v Public Prosecutor* [1999] 1 MLJ 321, (MR) ('kes 1999') di mana mahkamah perlu menentukan isu serupa iaitu sama ada perkara berhubung jaminan boleh dirayu ke Mahkamah Rayuan dengan mengambil kira tafsiran perkataan 'decision' dalam s 3 AMK dan keputusan Mahkamah Persekutuan dalam kes *Dato Seri Anwar Ibrahim v Public Prosecutor [2010]* ('kes 2010'). Perayu menjawab dengan berhujah bahawa perkataan 'decision' sepertimana ditafsirkan dalam s 3 AMK tidak termasuk apa-apa keputusan yang dibuat semasa perbicaraan tentang apa-apa perkara yang tidak melupuskan terus hak-hak pihak-pihak dan bahawa ia dengan sendirinya tidak mengecualikan hak perayu mengemukakan rayuan terhadap keputusan oleh hakim perbicaraan. Perayu selanjutnya berhujah bahawa keputusan berkaitan penarikan diri hakim, yang timbul di hadapan mahkamah ini dalam kes 1999 adalah salah dan panel ini tidak patut terikat dengannya.

Diputuskan, menolak rayuan dan permohonan lisan perayu untuk menggantung perbicaraan meliwat sementara menunggu keputusan rayuan yang dikemukakannya kepada Mahkamah Persekutuan:

(1) Perayu dengan sengaja telah mengasingkan perenggan 121 daripada penghakiman dan membacanya di luar konteks. Ia sengaja dilakukan dengan niat jahat yang telah difikirkan kemudian bagi tujuan memutarbelitkan penghakiman bertulis hakim perbicaraan di penutup kes pendakwaan. Dalam keadaan sedemikian adalah sukar untuk mahkamah ini mempercayai dan menerima bahawa pemfailan notis usul tidak lain hanyalah secara niat baik atau timbul daripada kepercayaan yang tulen bahawa hakim perbicaraan telah bersikap berat sebelah terhadap perayu. Dalam apa-apa kes setelah memeriksa keputusan hakim perbicaraan dalam konteks yang ia telah dibuat, adalah didapati bahawa hakim perbicaraan telah menggunapakai prinsip undang-undang yang betul apabila beliau telah meneliti keputusan pendakwaan dengan terperinci sebelum memutuskan bahawa pendakwaan telah berjaya membuktikan kes prima facie terhadap perayu. Bukan satu kesalahan untuk hakim perbicaraan menggunakan perkataan 'truthful' untuk menggambarkan pengadu. Oleh itu, pengataan perayu tentang pra-penghakiman dan berat sebelah jelas tidak berasas (lihat perenggan 17–21, 28–30 & 61–62).

(2) Undang-undang berkaitan keputusan hakim perbicaraan yang enggan menarik diri beliau daripada mendengar atau terus mendengar perbicaraan perayu kerana pertuduhan meliwat agak tetap. Ia tidak boleh dirayu. Selain kes 1999 terdapat kes Mahkamah Persekutuan dalam kes 2010, yang juga berkaitan isu sama dan tiba kepada kesimpulan bahawa keputusan mahkamah perbicaraan bukan'decision' sepertimana ditafsirkan dalam s 3 AMK dan justeru itu tidak boleh dirayu.

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Berdasarkan prinsip stare decisis, mahkamah ini terikat dengan keputusan Mahkamah Persekutuan dalam kes 2010. Apapun s 3 AMK telah dipinda oleh Parlimen dalam tahun 1988 dan oleh kerana Parlimen tidak boleh dikatakan telah gagal membuat pindaan maka mahkamah ini hendaklah memberi kuasa terhadap seksyen yang dipinda. Tafsiran perkataan 'decision' dalam s 3 AMK hendaklah diberi maksud biasa dan semulajadi. Bahkan, meskipun mahkamah ini telah didesak agar berani dan tidak mengikut keputusannya dalam kes 1999 ia tidak berbuat demikian (lihat perenggan 36–37, 43–47).

(3) Hakim perbicaraan telah melaksanakan kewajipan kehakiman beliau dalam menilai keterangan yang telah dikemukakan oleh pendakwaan atas penilaian maksimum tanpa menunjukkan sikap berat sebelah. Setelah menggunapakai ujian sikap berat sebelah yang berbahaya sebenar mahkamah ini mendapati bahawa fakta dan keadaan kes ini berpihak untuk meneruskan perbicaraan meliwat di hadapan hakim perbicaraan yang sama. Oleh itu permohonan agar hakim perbicaraan menarik diri telah ditolak dan bantahan awal yang telah dibangkitkan oleh pendakwaan dibenarkan (lihat perenggan 64, 66).

(4) Dalam kes ini perayu telah memohon untuk penggantungan prosiding jenayah apabila rayuannya ke Mahkamah Persekutuan terhadap keputusan mahkamah ini masih belum difailkan. Dalam menentukan sama ada penggantungan itu dibenarkan maka keseriusan kesalahan telah ditekankan yang mana sedang dihadapkan oleh perayu merupakan faktor relevan untuk menolak kebenaran penggantungan. Selanjutnya, taktik melengah-lengahkan yang dilakukan oleh perayu juga faktor untuk enggan membenarkan penggantungan itu (lihat perenggan 80–90).]

Notes

For cases on application for stay of proceedings, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 7260–7294.

For cases on application to recuse judge in criminal trial, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4139–4148.

Cases referred to

Arab Monetary Fund v Hashim and Others (No 8) [1993] TLR 243 (refd)

Charles Bradlaugh v Henry Lewis Clark (1883) 8 App Cas 354 (refd)

Che Minah Remeli v Pentadbir Tanah, Pejabat Tanah Besut, Terengganu & Ors [2008] 5 MLJ 206; [2008] 3 CLJ 653; [2008] 3 AMR 365, CA (refd)

Dalip Bhagwan Singh v PP [1998] 1 MLJ 1, FC (refd)

Dato' Seri Anwar Ibrahim v PP [2010] 6 MLJ 585, FC (folld)

Dato' Seri Anwar Ibrahim v PP [2011] 2 CLJ 845; [2011] 4 AMR 201, CA (refd)

Dato' Seri Anwar bin Ibrahim v PP [1999] 1 MLJ 321, CA (folld)

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Dato' Tan Heng Chew v Tan Kim Hor [2006] 2 MLJ 293, FC (refd)
Elizabeth Warburton v James Loveland, Lassee of George Ivie, Henry Ivie, and Others (1832) 5 ER VI Bligh NS 1 (refd)
Halki Shipping Corp v Sopex Oils Ltd [1998] 2 All ER 23, CA (refd)
Haryadi bin Dadeh v PP [2000] 4 MLJ 71, FC (refd)
Jones v National Coal Board [1957] 2 QB 55 (refd)
Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 257, FC (refd)
Lim Eng Kay v Jaafar bin Mohamed Said [1982] 2 MLJ 156, FC (refd)
Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara [2002] 1 MLJ 321 (refd)
Mah Kok Cheong v R [1953] MLJ 46 (refd)
Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 MLJ 1, FC (refd)
Medicaments and Related Classes of Goods (No 2), In re [2001] 1 WLR 700 (refd)
Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd [2002] 3 MLJ 49, CA (refd)
Muir v Commissioner of Inland Revenue [2007] 3 NZLR 495, CA (refd)
Nokes v Doncaster Amalgated Collieries, Limited [1940] AC 1014 (refd)
PP v Dato' Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1, HC (refd)
PP v Ong Cheng Heong [1998] 6 MLJ 678, HC (refd)
PP v Saimin & Ors [1971] 2 MLJ 16 (refd)
R v Gough [1993] AC 646, HL (folld)
R v Shivpuri [1986] 2 All ER 334, HL (refd)
Rowstead Systems Sdn Bhd v Bumicrystal Technology (M) Sdn Bhd [2005] 3 MLJ 132, CA (folld)
Tunde Apatira & Ors v PP [2001] 1 MLJ 259, FC (refd)
Walter a/l Pathrose Gomez & Ors v Sentul Raya Sdn Bhd [2005] 6 MLJ 555, HC (refd)

Legislation referred to

Criminal Procedure Code ss 112, 180, (1), (4), 388(i)
Courts of Judicature Act 1964 ss 3, 50(1)(a) 102
Penal Code s 377B
Rules of the Court of Appeal 1994 r 13

Appeal from: Criminal Trial No 45–9 of 2009 (High Court, Kuala Lumpur)

Karpal Singh (Ramkarpal Singh with him) (Karpal Singh & Co) for the appelant.
Nordin Hassan (Wong Chiang Kiat, Noorin Badaruddin, Naidatul Athirah Azman and Mira Mirna Musa with him) (Deputy Public Prosecutors, Attorney General's Chambers) for the respondent.

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Abdul Malik Ishak JCA (delivering judgment of the court):

THE NOTICE OF MOTION TO RECUSE THE TRIAL JUDGE

[1] By way of a notice of motion dated 2 June 2011, the appellant, Dato' Seri Anwar bin Ibrahim, filed an application to recuse justice Dato' Mohamad Zabidin bin Mohd Diah ('the learned trial judge') from continuing to hear the criminal proceedings against the appellant vide Criminal Trial No 45–9 of 2009 for reasons of pre-judgment and biasness. The appellant also sought for an order that the hearing be heard de novo before another judge of the High Court and, in the meantime, the appellant's bail be extended until the hearing is fixed de novo before another judge of the High Court. And finally, the appellant also prayed in aid of the omnibus prayer in that the appellant sought for any other order which the High Court thinks fit and suitable. Perhaps the appellant was thinking of the judgment of Salleh Abas FJ (later the Lord President of the Federal Court) in the case of *Lim Eng Kay v Jaafar bin Mohamed Said* [1982] 2 MLJ 156 (FC), where His Lordship writing for the Federal Court aptly said at p 160 that the omnibus prayer 'must not be treated as a mere ornament to pleadings devoid of any meaning'.

[2] And relying on the omnibus prayer, the appellant sought by way of an alternative that he be given an acquittal and discharge with unconditional release.

[3] It must be emphasised that the notice of motion was filed after the learned trial judge held that the prosecution had succeeded in proving a prima facie case against the appellant and had called the appellant to enter his defence for an offence under s 377B of the Penal Code for committing carnal intercourse against the order of nature on one Mohd Saiful Bukhari bin Azlan. Having heard the notice of motion, the learned trial judge dismissed it forthwith and he has since rendered a short written judgment for dismissing the notice of motion. The appeal before us centred on the dismissal of that notice of motion by the learned trial judge.

OBSERVATIONS

[4] This is the third attempt by the appellant to recuse the learned trial judge from hearing this case. The first application for recusal was filed by the appellant on 8 February 2010 while the second application to recuse the learned trial judge was filed on 24 November 2010 (see *Dato' Seri Anwar Ibrahim v Public Prosecutor* [2011] 2 CLJ 845; [2011] 4 AMR 201 (CA), with a coram of Low Hop Bing, Abdul Malik Ishak and Ahmad Maarop JJCA).

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[5] This case will fall in history. It will be chronicled as the only known case in our country or for that matter within the Commonwealth enclave where the appellant as an accused person persistently and consistently filed one application after another in an attempt to recuse the learned trial judge from hearing and continuing to hear the sodomy trial which is ongoing.

[6] It seems that the appellant here is trying his level best to scuttle his sodomy trial for reasons best known to him, much to the chagrin of the prosecution and the exasperation of the members of the public at large.

[7] It must be recalled that the appellant did not proceed with the appeal against the decision of the learned trial judge in dismissing the first application for recusal. In fact, the appellant withdrew his appeal a few days before the appeal for the first application for recusal was heard by this court. However, the appellant proceeded with his appeal in regard to the second application for recusal before this court and this court handed down its written decision on 14 January 2011 as reflected in *Dato' Seri Anwar Ibrahim v Public Prosecutor*. In an illuminating judgment, Low Hop Bing JCA said in *Dato' Seri Anwar Ibrahim v Public Prosecutor* at pp 851 – 852 of the CLJ reporting and at p 207 of the AMR reporting:

> As the definition of 'decision' in s 3 is clear and unambiguous, it is the duty of the court to give effect to it. This court has no powers beyond those conferred by Parliament. Accordingly, there is no jurisdiction to hear an interlocutory appeal, ie interim appeal against a ruling which does not constitute a final resolution of the whole controversy, or 'an appeal that occurs before the trial court's final ruling on the entire case.' (see *Black's Law Dictionary* (8th Ed) and *Regina v Collins* [1970] 1 QB 710). Justice demands that cases should move without unnecessary interruption to their final conclusion. The right of a party who is aggrieved by a ruling, after all, is not being compromised, as the party can always raise the issue during the substantive appeal, if any, which may be filed after the trial process is brought to its conclusion.

[8] Abdul Malik Ishak JCA, writing a separate concurring judgment in *Dato' Seri Anwar Ibrahim v Public Prosecutor* aptly said at p 854 of the CLJ reporting and at p 209 of the AMR reporting:

> The prosecution raised a preliminary objection fashioned in this way. Whether the ruling of the learned trial judge in refusing to recuse himself from hearing the criminal trial of the appellant is appealable? I would answer this question in the negative. It is not a 'decision' within the meaning of s 3 of the CJA. I will now elaborate.

[9] Continuing at p 862 of the CLJ reporting and at p 215 of the AMR reporting, His Lordship had this to say:

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The ruling by the learned trial judge is interlocutory in nature and made in the course of the trial and it is not final. And since the ruling of the learned trial judge is not appealable, this court has no jurisdiction to hear the appeal.

[10] Likewise here, the appeal filed by the appellant dated 6 June 2011 against the ruling of the learned trial judge who refused to recuse himself after he held that the prosecution had succeeded in proving a prima facie case under s 377B of the Penal Code and calling the appellant to enter his defence accordingly, *is not appealable* and this court too has no jurisdiction to hear the appeal and the appeal should be dismissed in limine.

[11] Be that as it may, lest we be accused of an oversight we shall now examine the grounds supporting the notice of motion to recuse the learned trial judge. For this purpose, an examination of the appellant's affidavit affirmed on 2 June 2011 will now be undertaken.

THE APPELLANT'S AFFIDAVIT

[12] The main plank of the appellant's complaint can be seen at para 5 of the appellant's affidavit and it is appropriate to reproduce them here:

5. Saya adalah dinasihatkan oleh peguamcara saya, nasihat yang saya percayai adalah tepat dan benar bahawa dalam alasan penghakiman oleh Y.A. Dato' Mohd Zabidin Bin Mohd Diah, di antara lain, telahpun menyatakan, di muka surat 43–44 seperti berikut:

'Nothing came out from the lengthy cross-examination of PW1 or from the evidence of other prosecution's witnesses that could suggest what PW1 had told in his evidence was something which was not probable. I find PW1's evidence remains intact. He had truthfully and without embellishment or exaggeration in his evidence narrated in minute detail how he was sodomized by the accused on the date and at the place stated in the charge. *I find him to be a truthful witness* and his evidence is reliable and if accepted would establish all the facts required to prove the charge against the accused.

[13] This would be followed by para 8 and in this paragraph the appellant conveniently blamed the learned trial judge for arriving at a conclusive finding of beyond reasonable doubt against the appellant at this stage of the trial. Paragraph 8 of the appellant's affidavit is worded in this fashion:

8. Saya adalah dinasihatkan oleh peguamcara saya, nasihat yang saya percayai adalah tepat dan benar bahawa dengan membuat penemuan (finding) seperti berikut:

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'He had *truthfully* and without embellishment or exaggeration in his evidence narrated in minute detail how he was sodomized by the accused on the date and at the place stated in the charge. *I find him to be a truthful witness* and his evidence is reliable and if accepted would establish all the facts required to prove the charge against the accused.'

YA Hakim Dato' Mohd Zabidin bin Mohd Diah telah membuat satu penemuan konklusif dan dengan ini memutuskan pihak pendakwaan telah 'proved their case beyond reasonable doubt as to the guilt of the accused at the close of the case for the prosecution' yang telahpun mengakibatkan peruntukan mandatori dalam seksyen 182A(1) Kanun Acara Jenayah menjadi sia-sia ('nugatory'). Peruntukan tersebut berbunyi:

'At the conclusion of the trial, the court *shall consider all the evidence adduced before it* and shall decide whether the *prosecution has proved its case beyond reasonable doubt*'.

[14] With respect, it is unfair to criticise the learned trial judge without taking into account the written grounds of judgment of His Lordship in relation to the notice of motion. In dismissing the notice of motion, the learned trial judge said at pp 77–78 of the appeal record at *Jilid* 1:

[3] Perlu ditekankan di sini, tiada di mana-mana dalam penghakiman setebal 68 muka surat, ada dinyatakan pendakwa telah membuktikan kesnya melampaui keraguan yang munasabah pada peringkat ini. Malah apa yang ditekankan dari mula hingga akhir penghakiman adalah, di akhir kes pendakwaan, pihak pendakwa hanya perlu membuktikan satu kes prima facie seperti mana ditakrifkan bawah s 180(4) Kanun Acara Jenayah. Dalam menentukan perkara ini, mahkamah mesti membuat penilaian maksimum atas keterangan pihak pendakwa seperti mana di saran dalam kes *Looi Kow Chai & Anor v Public Prosecutor* [2003] 1 CLJ 734.

[15] It was certainly an uncalled for criticism bent to deceive and confuse the uninitiated. It is easy to criticise but it is always difficult to justify it.

[16] Essentially there is only one ground to support the appellant's application to recuse the learned trial judge. It is captured in para 8 of the appellant's affidavit as alluded to earlier. And it arose out of the written judgment of the learned trial judge at the close of the prosecution's case as seen at pp 92–159 of the appeal record at *Jilid* 1 particularly the ruling at para 121. For convenience, the ruling at para 121 was worded as follows:

[121] In our case beside(s) there was opportunity for the offence to take place, the evidence of PW1 showed the offence did in fact (occur). PW1 was subjected to lengthy cross-examination. PW1 steadfastly and consistently described in detail how the accused had introduced his penis into PW1's anus with the aid of lubricant. Nothing came out from the lengthy cross-examination on PW1 or from the evidence of other prosecution's witnesses that could suggest what PW1 had told in his evidence was something which was not probable. I find PW1's evidence remains

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intact. He had truthfully and without embellishment or exaggeration in his evidence narrated in minute detail how he was sodomised by the accused on the date and at the place stated in the charge. I find him to be a truthful witness and his evidence reliable and if accepted would establish all the facts required to prove the charge again(st) the accused. Thomson CJ in *Public Prosecutor v Mohamed Ali* [1962] MLJ 257 said at p 258:

> In the absence of contradiction, however, and in the absence of any element of inherent probability the evidence of any witness, whether a police witness or not, who gives evidence on affirmation, should normally be accepted.

[17] There are 183 paragraphs in the written judgment of the learned trial judge and yet the appellant saw it fit to identify and highlight para 121 and argue that based on para 121 the learned trial judge had pre-judged the case. In our judgment, it is mischievous to deliberately take para 121 in isolation and read it out of context because that would mislead and give the wrong impression to the uninformed public at large that the learned trial judge had pre-judged the case against the appellant. That was the unkindest cut of them all. It was wilfully done with malice aforethought for the sole purpose of distorting the written judgment of the learned trial Judge at the close of the prosecution's case. It is difficult for us to believe and accept that the filing of the notice of motion was anything but bona fide.

[18] It is also difficult for us to accept that the notice of motion was filed out of a genuine belief that the learned trial judge had been biased against the appellant.

[19] Two germane questions must be posed. Firstly, whether the learned trial judge had pre-judged the case? Secondly, whether the learned trial judge had been biased against the appellant? The answers to these two questions can be found in the written judgment of the learned trial judge especially at para 183, which was worded as follows:

> [183] Based on all the above reasons, I find the prosecution, through the evidence of PW1 which had been corroborated in material particulars, had proved all the facts required to establish all the ingredients of the charge. I find a prima facie case as defined under s 180 of (the) Criminal Procedure Code had been made out against the accused. Therefore the accused is called to enter his defence.

[20] That should put an end to the allegation that the learned trial Judge had applied the wrong test at the end of the prosecution's case before calling the defence of the appellant to the sodomy charge. It is ideal, at this juncture, to reproduce s 180(4) of the Criminal Procedure Code. It is worded as follows:

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180(4) For the purpose of this section, a prima facie case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction.

[21] By invoking s 180(4) of the Criminal Procedure Code, the learned trial judge knew that the prosecution must establish a prima facie case at the end of the prosecution's case before calling the defence of the appellant to the sodomy charge. His Lordship was merely echoing the phrase that 'the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction' when he invoked s 180(4) of the Criminal Procedure Code.

[22] In order to ascertain whether or not the ruling at para 121 of the written judgment of the learned trial Judge was in the nature of a pre-judgment, we must examine in what context the ruling was made. It cannot be denied, on perusal of the written judgment of the learned trial judge, that the ruling was made after His Lordship had embarked on a discussion on whether or not Mohd Saiful Bukhari bin Azlan (PW1) — the complainant, is a credible witness and whether PW1's evidence is credible evidence.

[23] The sub-heading of the written judgment of the learned trial judge at p 126 of the appeal record at *Jilid* 1, just before para 104 boldly stated, 'Decision at the end of the case for prosecution' and all the preceding paragraphs to that of para 104 generously evaluated the evidence for the prosecution on a maximum evaluation basis. It is quite tedious in the extreme to reproduce those tell-tale evidence here. Suffice that we reproduce the contents of para 104 of the written judgment of the learned trial judge:

[104] At the close of the prosecution's case what was needed to be proved was a prima facie case. Under section 180(4) of the Criminal Procedure Code a prima facie case is said to be made out when the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction. As was held in the case of *Looi Kow Chai & Anor v Public Prosecutor* [2003] 1 CLJ 734, in determining whether prosecution had successfully established a prima facie case or not, the court must subject the prosecution's evidence to the maximum evaluation. It was held in that case:

'The correct test to be applied in determining whether a prima facie has been made out under s 180 of Criminal Procedure Code (and this would apply to a trial under s 173 of the Code) is that as encapsulated in the judgment of Hashim Yeop Sani FJ (as he then was) in *Dato' Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 1 CLJ 138; [1983] CLJ (Rep) 721 (HC) p 152 (p 752 g). Therefore a judge sitting alone under s 180 of the CPC must subject the prosecution's evidence to maximum evaluation and ask himself the question: 'if I decided to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution's case? If the answer is in the

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A negative, then no prima facie case has been made out and the accused would be entitled to an acquittal. Subjecting the evidence of the prosecution to (a) maximum evaluation to determine if the defence is to be called does not mean that the prosecution has to prove its case beyond a reasonable doubt at (that) intermediate stage'.

B

[24] Proceeding ahead, we have para 105 of the written judgment of the learned trial judge. It made a brief reference to the charge against the appellant.

[25] This is followed by para 106 where the learned trial judge wrote:

C

[106] The prosecution relied on PW1's evidence to prove its case where PW1 clearly testified that he was at the place mentioned in the charge. While PW1 was there the accused introduced his penis into PW1's anus until accused ejaculated.

D

[26] Continuing, the learned trial judge said at para 107:

[107] This evidence from PW1, if accepted, clearly established a prima facie case for an offence of carnal intercourse against the order of nature as stated in the charge. So, the question here is whether PW1 was a credible witness and whether his
E evidence as to what transpired between him and the accused in the unit 11—5—1 was true and could safely be relied on. If the court finds PW1 not to be a credible witness, then the accused has to be acquitted without having to look for corroborative evidence to support PW1's evidence. In the case of Director of *Public Prosecutions v Kilbourne* [1973] 1 All ER 440, Lord Hailsham of St Marylebone LC said at p 452:

F

Corroboration is only required or afforded if the witness requiring corroboration or giving it is otherwise credible. If his evidence is not credible, a witness's testimony should be rejected and the accused acquitted, even if there could be found evidence capable of being corroboration in other testimony. Corroboration can only be
G afforded to or by a witness who is otherwise to be believed. If a witness's testimony falls of its own inanition the question of his needing, or being capable of giving, corroboration does not arise.

[27] We do not propose to reproduce the rest of the paragraphs of the written
H judgment of the learned trial judge. They consisted of deliberation and evaluation by the learned trial judge in ascertaining whether PW1 is a credible witness and whether his evidence could be relied upon.

[28] We are satisfied that the learned trial judge had applied the correct
I principle of law when His Lordship evaluated the prosecution's evidence at a maximum level before deciding whether the prosecution had succeeded in proving a prima facie case against the appellant before calling the appellant to enter his defence as opposed to a beyond reasonable doubt test as suggested by the appellant.

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[29] Having subjected the prosecution's evidence to a maximum evaluation, we see nothing wrong nor objectionable when the learned trial Judge used the word 'truthful' in para 121 of his written judgment in describing PW1 bearing in mind that:

> The meaning of a 'prima facie' case in s 180(1) of the Criminal Procedure Code must be understood in the context of a non-jury trial. A prima facie case arises when the evidence in favour of a party is sufficiently strong for the opposing party to be called on to answer. The evidence adduced must be such that it can be overthrown only by rebutting evidence by the other side. Taken in its totality, the force of the evidence must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts existed or did happen. As this exercise cannot be postponed to the end of the trial, a maximum evaluation of the credibility of witnesses must be done at the close of the case for the prosecution before the court can rule that a prima facie case has been made out in order to call for the defence.

(per Augustine Paul J (later FCJ) in *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1, at p 63).

[30] The word 'truth' was also employed by Spenser Wilkinson J, in his judgment in the case of *Mah Kok Cheong v R* [1953] MLJ 46 when His Lordship discussed the procedure on the question of whether the accused had raised a reasonable doubt at the conclusion of the trial. At p 47, this was what His Lordship said:

> I thought the decision in *Mohamed Yatim*'s case had made the position clear, but from various cases recently before me it does not appear to have done so. I must, therefore now repeat that in ordinary criminal cases such as perjury, forgery, cheating and so on where no question of unlawful possession of property arises all discussion as to what might reasonably be true or what is consistent with innocence are both irrelevant and misleading. Almost every defence put forward by an accused is consistent with innocence or it would not be put forward; nor would it be a very good defence if it could not reasonably be true. But whatever may be the defence to a criminal charge the sole question which a subordinate court has to ask itself at the conclusion of the trial is — Does the defence raise a reasonable doubt as to the truth of the prosecution case or as to the accused's guilt? I say 'the sole question' advisedly because in this country the accused will not have been called on for a defence at all unless the prosecution have first proved a case.

[31] Again, in *Public Prosecutor v Saimin & Ors* [1971] 2 MLJ 16, Sharma J employed the word 'true' in his judgment. At p 17 this was what His Lordship said:

> A conviction cannot be sustained even if the court is satisfied that the prosecution story 'may be true' unless and until it is found that the prosecution story 'must be true'. The burden of proof remains on the prosecution throughout the trial. If the

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learned magistrate was not satisfied with the case of the prosecution it was his duty to acquit and discharge the accused at the close of the prosecution case.

[32] Further down the same page Sharma J had this to say:

> The falsity of the defence does not relieve the prosecution from proving the prosecution case beyond reasonable doubt. The burden of proving guilt in a criminal charge is always on the prosecution except in certain cases with which we are not concerned here.
>
> As the learned magistrate seems to have ignored the very basic principle of criminal law, it may perhaps serve a useful purpose to remind those administering justice in the lower courts that evidence discloses a prima facie case when it is such that if uncontradicted and if believed it will be sufficient to prove the case against the accused.

THE PRELIMINARY OBJECTION

[33] To nip the appeal that centred on the dismissal of the notice of motion by the learned trial judge, Dato' Nordin Hassan for the prosecution raised a pertinent preliminary objection. It was couched in this manner. That the ruling of the learned trial judge not to recuse himself is not appealable. That it did not fall within the meaning of the word 'decision' in s 3 of the Courts of Judicature Act 1964 ('CJA') read together with s 50(1)(a) of the CJA for the simple reason that the ruling of the learned trial judge was made in the course of the trial and it did not finally dispose of the appellant's rights under the sodomy charge. The learned deputy relied heavily on the decision of this court in *Dato' Seri Anwar Ibrahim v Public Prosecutor* to drive home the message that the appeal should be dismissed for want of jurisdiction.

[34] In 1999, this court delivered a landmark decision in the case of *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [1999] 1 MLJ 321 (CA) with a coram of Lamin PCA, NH Chan and Ahmad Fairuz JJCA (we will refer to this judgment as the '1999 case'). Now, the appellant in the 1999 case was charged with non-bailable offences and his trial before the High Court was still continuing. The High Court judge refused the appellant's application for bail under s 388(i) of the Criminal Procedure Code. Aggrieved, the appellant appealed. The issue before the court was whether the matter of bail is appealable to the Court of Appeal, taking into consideration the definition of the word 'decision' in s 3 of the CJA after the amendment in 1998. NH Chan JCA delivering a separate judgment had this to say at p 330 of the 1999 case:

> The real distinction is between (for want of a better word) what is called final judgments and orders and interlocutory judgments and orders. In general, a judgment or order which determines the principal matter in question is termed

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'final': see 26 *Halsbury's Laws of England*, para 505 at p 238. Actually, the use of the term 'final' is tautological as all judgments and orders are final. The term (final) is used for the purpose of distinguishing between judgments and orders and 'interlocutory' judgments and orders. The difference is that judgments and orders which are not termed 'interlocutory' judgments and orders are appealable under the new meaning of the word 'decision' as defined in s 3 by the 1998 amendment. In other words, judgments and orders which determine the principal matter in question are termed 'final' judgments and orders, and they are appealable. But, those judgments and orders which give no final decision on the matters in dispute (which are termed 'interlocutory' judgments and orders) are now no longer appealable.

[35] Continuing at p 335 of the 1999 case, NH Chan JCA aptly said:

A decision made pending the trial of the charges against the appellant is not, in our considered opinion, a decision (ruling) that had the effect of finally determining the rights of the appellant. It is only the outcome of the trial that would have the effect of finally disposing of his rights. A decision on bail (by the court of first instance), whether the grant or refusal of it, will not finally determine the rights of the appellant in the outcome of his trial. That being so, the order of the High Court in refusing to admit the appellant to bail is not appealable to the Court of Appeal.

[36] Recently the Federal Court in *Dato' Seri Anwar Ibrahim v Public Prosecutor* [2010] 6 MLJ 585, at pp 595–596, with a coram of Arifin Zakaria CJ (Malaya), James Foong and Raus Sharif FCJJ (we will refer to this judgment as the '2010 case') dealt with the same issue, and Arifin Zakaria CJ (Malaya) delivering the judgment of the Federal Court had this to say:

[24] The underlying reason behind the amendment to the definition of 'decision' in s 3 of the CJA, introduced by Amendment Act A1031 of 1998, which came into effect on 31 July 1998 is to stop parties from stalling a trial before the trial court by filing appeal after appeal on rulings made by the trial court in the course of a trial. This is what the amendment seeks to achieve as evident from the explanatory statement to the Bill which reads:

2 cl 2 seeks to amend s 3 of Act 91.

At the moment, in the course of hearing a case, if the court decides on the admissibility of any evidence or document, the dissatisfied party may file an appeal. If such appeal is filed, the court has to stop the trial pending the decision of the appeal by the superior court. This cause a long delay in the completion of the hearing, especially when an appeal is filed against every ruling made by the trial court. The amendments is proposed in order to help expedite the hearing of cases in trial courts.

[25] Quite apart from the explanatory statement to the Bill the definition of 'decision' by itself, to our mind, is sufficiently clear, and it is the duty of the court to give effect to the same. Justice demands that cases should move without unnecessary

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interruption to their final conclusion. That is what the amendment seeks to achieve. The right of a party who is aggrieved by a ruling, after all, is not being compromised, as the party can always raise the issue during the appeal, if any, to be filed after the trial process is brought to its conclusion.

CONCLUSION

[26] For the above reasons, we agree with the Court of Appeal that the ruling of the trial court in this case is not a 'decision' as defined in s 3 of the CJA and hence it is not appealable. In the light of our decision, it is therefore not necessary for us to consider grounds 3 and 4 of the petition.

[27] Accordingly, the appeal is dismissed.

[37] That would be the end of the road for the appellant. Based on the principle of stare decisis, we are bound by the Federal Court decision in the 2010 case.

[38] Undaunted, Mr Karpal Singh for the appellant submitted that the number of attempts at recusing the learned trial judge was not an issue before this court. He submitted that the appellant has every right to exhaust his legal avenue. He further submitted that the word 'decision' as defined in s 3 of the CJA merely meant any 'judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties' and that by itself cannot exclude nor impinge the right of the appellant to lodge an appeal against the ruling of the learned trial judge. While acknowledging the true meaning of the word 'decision' in s 3 of the CJA, learned counsel for the appellant seems to ignore the reality of the matter. You just cannot appeal against the ruling of the learned trial judge which does not finally dispose of the rights of the parties. Low Hop Bing JCA in *Dato' Seri Anwar Ibrahim v Public Prosecutor* aptly said at p 851 of the CLJ reporting and at pp 206–207 of the AMR reporting that:

> The intention as manifested in s 3, read with s 50(1)(a) and the explanatory statement, is clear and unambiguous ie, to bar the filing of an appeal against a ruling made by a trial court and also to help expedite the hearing of cases in trial courts. In other words, while the law allows appeals against a judgment, sentence or order, it expressly excludes all appeals against all rulings made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties. Put simply, the intention of Parliament in enacting s 3 and s 50(1)(a) is to exclude interlocutory appeals in criminal causes or matters.

[39] Mr Karpal Singh submitted that the Federal Court in 2010 had occasion to consider the issue relating to final order in the 2010 case but he submitted that the Federal Court in the 2010 case was dealing, not with an

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order of recusal but rather with a ruling relating to the recording of a statement under s 112 of the Criminal Procedure Code.

[40] Mr Karpal Singh submitted that the ruling relating to recusal of a Judge arose before this court in *Dato' Seri Anwar Ibrahim v Public Prosecutor* but he submitted that that ruling was erroneous and this panel should not be bound by it. He then referred us to the decision of the Federal Court in *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1 with a coram of Eusoff Chin Chief Justice, Peh Swee Chin and Wan Adnan FCJJ, where Peh Swee Chin FCJ delivering the judgment of the Federal Court said at p 14:

> In Malaysia, the Federal Court and its forerunner, ie the Supreme Court, after all appeals to the Privy Council were abolished, has never refused to depart from its own decision when it appeared right to do so: see the above-mentioned Federal Court's cases on the question of burden of proof at the close of the prosecution's case.

[41] Earlier on His Lordship Peh Swee Chin FCJ placed a caveat:

> Experience in the United Kingdom has shown that the power 'to depart from a previous decision when it appears right to do so' has been used very sparingly.

[42] In *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259, the Federal Court with a coram of Eusoff Chin Chief Justice, Lamin PCA, Wan Adnan CJ (Malaya), Mohamed Dzaiddin FCJ and Gopal Sri Ram JCA dealt with the issue of stare decisis and Gopal Sri Ram JCA writing for the Federal Court said at pp 263–264 of the report:

> With respect, we are unable to accept the learned deputy's invitation to depart from Muhammed bin Hassan for three reasons. In the first place, Muhammed bin Hassan is a very recent decision of this court. It is bad policy for us as the apex court to leave the law in a state of uncertainty by departing from our recent decisions. Members of the public must be allowed to arrange their affairs so that they keep well within the framework of the law. They can hardly do this if the judiciary keeps changing its stance upon the same issue between brief intervals. The point assumes greater importance in the field of criminal law where a breach may result in the deprivation of life or liberty or in the imposition of other serious penalties. Of course, if a decision were plainly wrong, it would cause as much injustice if we were to leave it unreversed merely on the ground that it was recently decided. In a case as the present this court will normally follow the approach adopted by the apex courts of other Commonwealth jurisdictions as exemplified by such decisions as *R v Shivpuri* [1986] 2 All ER 334.
>
> The second reason is closely connected to the first. It also has to do with certainty in the law. The decision in Muhammed bin Hassan has been affirmed by our courts (see *Public Prosecutor v Ong Cheng Heong* [1998] 6 MLJ 678) and convictions have been quashed by this court acting on its strength. See, for example *Haryadi Dadeh*

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v Public Prosecutor [2000] 4 MLJ 71. If we accept the learned deputy's invitation to depart from Muhammed bin Hassan, it will throw the law into a state of uncertainty and cast doubt on the accuracy of the pronouncements made in those cases that have so recently applied the interpretation formulated in that case. It is bad policy for us to keep the law in such a state of flux especially upon a question of interpretation of a statutory provision that comes up so often for consideration before the courts.

[43] Likewise here, it is certainly bad policy for this panel to depart from the decision of this court in *Dato' Seri Anwar Ibrahim v Public Prosecutor*. The law as to the ruling of the learned trial judge in refusing to recuse himself from hearing or continue to hear the criminal trial of the appellant for the sodomy charge is quite settled. It is not appealable. The law as it stands, bars the filing of an appeal against such rulings made by the learned trial judge. The law only allows appeals against a judgment, sentence or order but it expressly excludes all appeals against all rulings made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties. With the amendment to the definition of the word 'decision' in s 3 of the CJA which was introduced by an Amendment Act A1031 of 1998 with effect from 31 July 1998, parties are stopped from filing one appeal after another against rulings made by the trial court in the course of the trial bearing in mind that such rulings are not final and would not have the effect of finally disposing of the rights of the parties.

[44] We were urged to be bold and to depart from the decision of this court in *Dato' Seri Anwar Ibrahim v Public Prosecutor*. We declined to do so.

[45] Parliament amended s 3 of the CJA by virtue of the Amendment Act A1031 of 1998 and we must give effect to it. Parliament cannot be said to amend in vain. Put in another way, Parliament does nothing in vain. This is a principle taken from the latin phrase lex nil frustra facit (the law does nothing in vain). See the speech of Henry LJ in *Halki Shipping Corp v Sopex Oils Ltd* [1998] 2 All ER 23 (CA), at pp 43–44.

[46] We categorically say that the definition of the word 'decision' in s 3 of the CJA must be given its ordinary and natural meaning. It is always prudent to bear in mind that the words of a statute must prima facie be given their ordinary meaning (*Nokes v Doncaster Amalgamated Collieries, Limited* [1940] AC 1014, at p; 1022). And as a rule of construction, the grammatical sense of the words is to be adhered to (*Elizabeth Warburton v James Loveland, Lessee of George Ivie, Henry Ivie, and Others* (1832) 5 ER VI Bligh NS 1; and *Charles Bradlaugh v Henry Lewis Clarke* [1883] 8 App Cas 354, at p 384).

[47] With respect, as a Member of Parliament, the appellant should know

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that the amendment to s 3 of the CJA must be given effect by all and sundry.

THE CHARGE

[48] The charge against the appellant reads as follows:

> That you, on 26 June 2008 between 3.01pm to 4.30pm at Unit 11—5—1, Desa Damansara Condominium, No: 99 Jalan Setiakasih, Bukit Damansara, Kuala Lumpur, in the Federal Territory of Kuala Lumpur, did intentionally commit carnal intercourse against the order of nature with Mohd Saiful Bukhari bin Azlan by inserting your penis into his anus, and thereby you have committed an offence punishable under section 377B of the Penal Code.

[49] The charge graphically described what the appellant did to Mohd Saiful Bukhari bin Azlan — PW1.

[50] The trial was unduly prolonged. It received wide media coverage. Twenty-six (26) witnesses testified for the prosecution and the prosecution then closed its case. On 16 May 2011, the learned trial judge called upon the appellant to enter his defence on the sodomy charge. Immediately thereafter the clarion call for the learned trial judge to recuse himself was made by the appellant via the notice of motion.

TO RECUSE OR NOT TO RECUSE

[51] That would be the question of the day.

[52] We are hesitant to make a finding of bias on the part of the learned trial Judge based on the facts and circumstances of this case. There are two categories of bias: actual bias and apparent bias. The phrase 'actual bias' has been applied to a situation where the judge has been influenced by partiality or prejudice in arriving at his decision and it has been demonstrated that the judge is actually prejudiced in favour of, or against a party. Whereas 'apparent bias' envisages a situation where circumstances exist which give rise to a reasonable apprehension that the judge may have been, or may be, biased.

[53] According to the case of *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700, ('Medicaments') the court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. And the court must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility or a real danger — the two being the same — that the tribunal was biased.

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[54] Lord Phillips of Worth Matravers MR in *Medicaments* at p 711, at para 37, defined the word 'bias' in this way:

> Bias is an attitude of mind which prevents the judge from making an objective determination of the issues that he has to resolve. A judge may be biased because he has reason to prefer one outcome of the case to another. He may be biased because he has reason to favour one party rather than another. He may be biased not in favour of one outcome of the dispute but because of a prejudice in favour of or against a particular witness which prevents an impartial assessment of the evidence of that witness. Bias can come in many forms. It may consist of irrational prejudice or it may arise from particular circumstances which, for logical reasons, predispose a judge towards a particular view of the evidence or issues before him.

[55] Bias can certainly take many forms. But merely analysing on a maximum evaluation basis the prosecution's evidence in a legally detached manner cannot be said to be bias. The learned trial judge was performing his judicial duty in assessing the evidence led by the prosecution on a maximum evaluation basis without any bias exhibited in order to determine whether there was a prima facie case for the appellant to answer in regard to the sodomy charge.

[56] The pre-requisites of a sound judicial system are independence and impartiality. For an effective and a strong judicial system, the impartiality of its judges are of paramount importance. But it cannot be denied that the public's confidence in the judicial system is shaped and moulded more by appearances.

[57] Some judges are quiet on the bench. They will sit mute, listening attentively to lawyers at the bar without interruption. They will not ask any question and will not voice a single opinion. They remain quiet throughout the proceedings. The members of the public will have a good perception of their conduct on the bench. They will only break their silence when they give judgment. Can they be construed to be bias when they side one party and not the other in their judgment? Certainly not.

[58] In some jurisdictions, it is a respectable tradition to remain mute on the bench but ours would not fall in that category. Our practice encourages some measure of disclosure of the judges' current thinking.

[59] A loud robust judge may be wrongly construed as displaying judicial bias notwithstanding that he is brilliant whereas the quiet resourceful judge may be considered as a good judge who is ever willing to listen to both sides. But both these types of judges share the same common aspirations: to dispense justice in big doses to all litigants. In the words of Sir Thomas Bingham MR in *Arab Monetary Fund v Hashim and Others (No 8)* [1993] TLR 243, at p 244:

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> Judges were constantly urged to be robust and interventionist to mitigate the blemish on the legal system which protracted trials, civil as well as criminal, had become.

[60] Lord Justice Denning in *Jones v National Coal Board* [1957] 2 QB 55 (CA), at p 64 succinctly said:

> The judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well.

[61] We are of the considered view that the allegations of pre-judgment and bias were obviously unfounded. Paragraph 121 of the written judgment of the learned trial judge was quoted out of context and that would surely undermine the credibility of the appellant in filing the notice of motion.

[62] We should apply the 'real danger of bias' test as enunciated by Lord Goff of Chieveley in *R v Gough* [1993] AC 646 (HL), to determine whether the learned trial judge rightly refused to recuse himself from continuing to hear the appellant's sodomy trial. We categorically say that the learned trial judge was right in refusing to recuse himself. His Lordship had correctly applied the prima facie test before he decided to call the defence of the appellant on the sodomy charge. A maximum evaluation of the evidence was undertaken by the learned trial judge and we find nothing wrong with his approach. At p 670 of the report, Lord Goff of Chieveley succinctly set out the law in these salient words:

> Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him …

[63] The Federal Court in *Dato' Tan Heng Chew v Tan Kim Hor* [2006] 2 MLJ 293, (FC) applied the 'real danger of bias' test as enunciated by Lord Goff of Chieveley in *Regina v Gough* as the correct test to determine the issue of recusal of the High Court judge. Abdul Hamid Mohamed FCJ (later the Chief

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Justice of Malaysia) writing the main judgment for the Federal Court in Dato' Tan Heng Chew's case aptly said at p 301 of the report:

> [23] To answer the question posed, I would say that the doctrine of stare decisis requires the Court of Appeal to follow the 'real danger of bias' test adopted by this court in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1 and *Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara* [2002] 1 MLJ 321. Furthermore, I see no reason why the test should be changed or modified.

[64] We will now pose this question, whether applying the 'real danger of bias' test, the learned trial judge should have recused himself? We would answer this question in the negative. The facts and circumstances favoured the continuation of the sodomy trial before the same learned trial judge. We are mindful of the sound advice of Abdul Hamid Mohamed FCJ (later the Chief Justice of Malaysia) in Dato' Tan Heng Chew's case at p 303:

> ... the court should be vigilant not to allow parties to do 'judge-shopping' by recusal of judges.

[65] 'Judge-shopping' is an ugly word. It should not happen in our judicial system.

[66] Be that as it may, in our judgment, the bid to disqualify and recuse the learned trial judge must be dismissed forthwith. The notice of motion to recuse the learned trial judge should not have been filed in the first place. The preliminary objection raised by the prosecution must be allowed.

THE STAY OF PROCEEDINGS

[67] Mr Karpal Singh orally applied to stay the continuation of the sodomy trial pending the outcome of the appellant's proposed appeal to the Federal Court. At this juncture, no appeal to the Federal Court has been lodged by the appellant.

[68] However, it was argued that in the event the Federal Court allowed the appellant's appeal to recuse the learned trial judge it would be a waste of precious judicial time for the learned trial judge to continue hearing the sodomy trial of the appellant.

[69] Learned counsel for the appellant relied on the decision of this court in *Rowstead Systems Sdn Bhd v Bumicrystal Technology (M) Sdn Bhd* [2005] 3 MLJ 132 (CA), and argued that the stay of proceedings should be allowed to enable the proposed appeal to proceed to the Federal Court.

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[70] *Rowstead* are poles apart from our present appeal. In *Rowstead*, the defendant was owned by the PAS-led Government of the State of Kelantan. The defendant had applied for the learned judicial commissioner at the High Court ('JC') to recuse himself from hearing the case involving the defendant. It was alleged that due to the JC's previous dealings with the United Malay National Organisation ('UMNO'), there would be a possibility of bias if the learned JC were to hear the case. The learned JC ruled that there were no merits in the application and therefore decided not to recuse himself from hearing the case as he completely believed he could conduct the case free of any bias whatsoever. Against that decision, the defendant had lodged an appeal to the Court of Appeal. The defendant applied for a stay of the proceedings of the matter pending the decision of the appeal. The stay was not applied at the High Court but instead the application was made only at the Court of Appeal. The issue was whether the original application could be entertained by the Court of Appeal. Counsel for the applicant submitted that the Court of Appeal had the jurisdiction to hear the application by virtue of s 44 of the CJA. The second issue was whether the stay should be allowed. It was held, allowing the application for stay of proceedings that based on the clear wording of s 44(1) of the CJA, this court — referring to the Court of Appeal, had the authority to entertain such an application. An appeal against the decision of the learned JC was pending in the Court of Appeal and being an interim application pending the hearing of the appeal, the Court of Appeal allowed the application. It was also held that in an application for a stay of proceedings, the applicant must show the existence of special circumstances. It was further held that the case came within the category of non-automatic disqualification. Hence there was a need to prove whether the element of bias exists. It has to be objectively decided, based on all the facts and circumstances of the case. The more important question to be asked was whether it was proper for such decision to be made by the presiding judge against whom bias has been alleged. When a party alleges that a presiding judge is biased, and if the presiding judge himself decides he is not, such decision would infringe the rule of natural justice in that 'one should not be a judge in one's own cause'. This would constitute special circumstances. And in the event that a stay of proceedings was not granted and the learned JC be allowed to proceed with the hearing of the case, it would result in a waste of time and effort by all persons involved and in the event the Court of Appeal allows the appeal, the whole proceedings conducted by the learned JC would have to be completely expunged. In the circumstances, it would be more expedient to allow a stay of the proceedings until the hearing of the appeal has been completed.

[71] We have this to say in regard to *Rowstead*. There was a pending appeal to the Court of Appeal from the decision of the learned JC. Here, an appeal to the Federal Court has yet to be filed against our decision today (6 July 2011).

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[72] *Rowstead* did not consider the 'real danger of bias' test in determining whether the learned JC should have recused himself notwithstanding that the Federal Court had earlier on applied the said test in:

(a) *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1 (FC); and in

(b) *Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara* [2002] 1 MLJ 321 (FC).

[73] Consequently, *Rowstead*'s suggestion that the request for recusal to be heard by another judge is quite radical. We categorically say that the recusal request, like the present matter, was rightly heard at the first instance by the learned trial judge and followed by this court.

[74] Rowstead did not consider nor ventilate on s 3 of the CJA read with s 50(1)(a) of the CJA and the explanatory statement thereto.

[75] The recusal application housed in the notice of motion concerned a long protracted trial that saw the legal manoeuvrings activated by the appellant at every nook and corner in an attempt to scuttle the criminal trial of the appellant for an offence of sodomising PW1. It is the mother of all trials in Malaysia.

[76] Having called the defence of the appellant for sodomising PW1, that does not mean that it is the end of the road for the appellant. The outcome is still uncertain. The appellant has to tender his defence in whatever way he deems fit after the three alternatives are read and explained to him by the learned trial judge. We would respect whatever course of election the appellant decides to pick.

[77] The trial must continue to its completion and only then would the learned trial judge decide the outcome, one way or the other. Once a decision is made, it is appealable.

[78] There are no special circumstances to warrant a stay.

[79] Rule 13 of the Rules of the Court of Appeal 1994 states as follows:

> Stay of proceedings on appeal
>
> 13. An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the High Court or the Court so orders and no intermediate act or proceeding shall be invalidated except so far as the Court may direct.

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[80] Section 102 of the Courts of Judicature Act 1964 (Revised 1972) also provides that an appeal from the Court of Appeal to the Federal Court, the court of last resort in Malaysia, shall not operate as a stay of execution or of proceedings under the decision appealed from unless the Court of Appeal or the Federal Court so orders.

[81] Two approaches are usually adopted by the courts, ie the special circumstances approach and the nugatory approach. Both these two approaches are not mutually exclusive. It is purely a matter of judicial discretion depending on the circumstances of the case whether the stay should be granted. *Halsbury's Laws of England,* Vol 17, (4th Ed), at p 272, at para 455 carries this caption:

> The court has an absolute and unfettered discretion as to the granting or refusing of a stay, and as to the terms upon which it will grant it, and will, as a rule, only grant a stay if there are special circumstances, which must be deposed to on affidavit unless the application is made at the hearing.

[82] At the end of the day, the court is free to adopt either approach be it the special circumstances approach or the nugatory approach, depending on the facts or circumstances of the case. The appellant has to show a valid reason or cause acceptable to us in order to justify our exercise of discretion for stay in favour of the appellant pending the hearing of the proposed appeal to the Federal Court. Regrettably the appellant failed to do so.

[83] On the principles of stay, it is ideal to read the following authorities:

(a) *Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd* [2002] 3 MLJ 49 (CA);

(b) *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257 (FC); and

(c) *Walter a/l Pathrose Gomez & Ors v Sentul Raya Sdn Bhd* [2005] 6 MLJ 555, (HC).

[84] Be that as it may, there are passages that appear in the judgment of this court in *Che Minah Remeli v Pentadbir Tanah, Pejabat Tanah Besut, Terengganu & Ors* [2008] 5 MLJ 206 at p 221; [2008] 3 CLJ 653 at pp 668–669; [2008] 3 AMR 365 at p 377(CA), that merit reproduction. We will now reproduce them (see the CLJ reporting):

> [35] In the common law world over the past decade there is rooted in our legal system the fundamental belief that judges who adjudicate must always do so without bias or prejudice and it must be perceived to be so. It is a correct assertion to say and I so say that a judge must be impartial and it is his impartiality that forms the core

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attribute of the judiciary. The presumption of impartiality of a judge must be upheld. It is the cornerstone of the judiciary. No one should carelessly argue that a particular judge is biased because the credibility of the judge depends on the presumption of his impartiality. And that presumption is deeply rooted in our legal system. That being the case, the burden is on the party arguing for a disqualification to establish that the circumstances justify the finding that the judge must be disqualified. Put it in another way, the onus of demonstrating bias lies with the person who is alleging that it is so. In *R v Smith & Whiteway Fisheries Ltd* [1994] 133 NSR (2d) 50 (CA), at pp 60–61, the court observed that the reviewing courts have been hesitant to make a finding of bias or to perceive a reasonable apprehension of bias on the part of a judge, in the absence of convincing evidence to that effect.

[36] There is a passage that appears in the case of *United States v Morgan*, 313 US 409 [1941], at p 421 that merits reproduction. It is this. That judges 'are assumed to be people of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.' This is food for thought for the appellant and her learned counsel.

[85] We venture to say that judges can disabuse their minds of any irrelevant personal beliefs or predispositions; and that judges must take into account the fact and the reality that they have a duty to sit in any case and they are not obliged to recuse themselves.

[86] It is common knowledge that in all common law jurisdictions, a judge takes a judicial oath on appointment. It is because of this judicial oath and the presumed impartiality of the Judges that the notion of a 'duty to sit' comes to the forefront. In *Muir v Commissioner of Inland Revenue* [2007] 3 NZLR 495 (CA), the New Zealand Court of Appeal aptly said that (see p 504):

The requirement of independence and impartiality of a judge is counterbalanced by the judge's duty to sit, at least where grounds for disqualification do not exist in fact or in law. This duty in itself helps protect judicial independence against manoeuvring by parties hoping to improve their chances of having a given matter determined by a particular Judge or to gain forensic or strategic advantages through delay or interruption to the proceeding. As Mason J emphasised in *Re JRL ex p CJL* (1986) 161 CLR 342 at p 352:

'[I]t is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour'.

[87] And according to Abdul Hamid Mohamad FCJ (later the Chief Justice of Malaysia) in *Dato' Tan Heng Chew*'s case, at p 301:

What is more important is the integrity and honesty of the judges themselves.

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[88] All these must be taken into account as the background scenario, in determining whether to allow the stay. It must be emphasised that the seriousness of the offence which the appellant is currently facing is a relevant factor for refusing to grant the stay.

[89] In *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)*, at p 68, the conduct of the defence in the trial was taken into account and the court denying the accused's application for a stay of execution pending appeal relied in part on the accused's reliance on tampered evidence and recourse to after thoughts.

[90] Here, the delaying tactics engineered by the appellant should be a factor in refusing to grant the stay.

[91] For these varied reasons, we dismissed the appellant's oral application to stay the sodomy trial proceedings pending the outcome of his proposed appeal to the Federal Court.

Appeal and appellant's oral application to stay the sodomy trial pending outcome of his proposed appeal to the Federal Court dismissed.

Reported by Kohila Nesan